IN THE

Supreme Court of the United States

OCTOBER TERM 1975

Supreme Court, U. S.
FILED
MAY 4 1976
MICHAEL RODAK, JR., CLERK

No. A-752

LACKAWANNA, NORTHERN NEW JERSEY & WATCHUNG POWER SQUADRONS,

Petitioners,

v.

MARILYN C. HINDEN, VERNON N. POTTER, Acting Director, DIVISION ON CIVIL RIGHTS, UNITED STATES POWER SQUADRONS, PALISADES POWER SQUADRON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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No. A-752

LACKAWANNA, NORTHERN NEW JERSEY & WATCHUNG POWER SQUADRONS,

Petitioners,

v.

MARILYN C. HINDEN, VERNON N. POTTER, Acting Director, DIVISION ON CIVIL RIGHTS, UNITED STATES POWER SQUADRONS, PALISADES POWER SQUADRON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

The petitioners, Lackawanna, Northern New Jersey and Watchung Power Squadrons, respectfully pray that a Writ of Certiorari issue to review the Order of the Supreme Court of New Jersey entered in this proceeding on December 10, 1975.

Opinions Below

No opinion was rendered by the Supreme Court of New Jersey. The Order of the Supreme Court denying Petitioners' Motion to Intervene is attached hereto as Appendix A. The unreported opinion of the Superior Court of New Jersey, Appellate Division, and its Order denying intervention is attached hereto as Appendix B. The unreported opinion of the Division on Human Rights Hearing Examiner and the resulting orders of the Division are incorporated by reference to the Appendix of the Jurisdictional Statement of *Palisades Power Squadron, et al.* v. *Marilyn C. Hinden, et al.*, which Appeal is presently before this Court (Docket No. A-756).

Jurisdiction

The denial of Petitioners' right to intervene and Respondents Palisades Power Squadron and United States Power Squadrons' Appeal by the Supreme Court of New Jersey were entered on December 10, 1975. This Petition for Certiorari was filed within the time allowed as extended by Order of Justice Brennan to May 8, 1976 (See Appendix C for Order). This Court's Jurisdiction is invoked under 28 U.S.C. 1257 (3).

Question Presented

Is there not patently a denial of due process of law within the understanding of the Federal Constitution where a Judgment in an action has been entered against petitioners who were not complained against, served, or made parties to the action?

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Constitutional Provisions Involved

UNITED STATES CONSTITUTION—AMENDMENT XIV

Section 1 (pertinent part)

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of Case

Petitioners, Lackawanna, Northern New Jersey and Watchung Power Squadrons, are local units of a national boating fraternity, known as the United States Power Squadrons (USPS). There are approximately four hundred chartered locals, called Squadrons (an archaic word for yacht club) in this fraternity. They operate pursuant to a national Constitution and are, for all practical purposes, essentially no different than the International Association of Shrine Yacht Clubs, the Loyal Order of Moose, the Benevolent and Protective Order of Elks, Kiwanis, Jaycees, and many other private clubs of like nature. There are about 80,000 individual members.

Petitioners are each individually incorporated as nonprofit corporations under the eleemosynary statute of the State of New Jersey. Each is a separate, distinct, autonomous, individual legal entity having its own individually elected officers, bank account, club publication, boating flag, social program and membership.

The Division on Civil Rights (Division) by a nominal Complainant, Marilyn C. Hinden, filed a Complaint on

January 5, 1971, against another individual Squadron, Palisades, and the national fraternity USPS, alleging Palisades to be a "place of public accommodation" pursuant to N.J.S. 10:5-1, *et seq.,* (Complaint attached hereto as Appendix D).

The three petitioners were not complained against, noticed, served, or made parties to that proceeding. Neither were any of the other three hundred ninety-nine Squadrons or locals in some twenty-nine or thirty other districts operating in the rest of New Jersey and throughout the United States.

On June 1, 1973, Palisades was held to be a "public accommodation" by a Hearing Examiner of the Division. By final Order of June 7, 1974, the Division ordered Palisades to change its membership practices and at the same time ordered USPS to delete "male" from its Constitution.

The Order went further. It stated *inter alia*:

> "Any violation of the provisions of this Order by a local Squadron shall constitute a violation by the United States Power Squadrons and such penalties and/or relief as may be granted as a result of such a violation shall apply to both the offending local squadron and to the United States Power Squadrons."

The individual petitioners were shocked that a violation by "a local Squadron" was not limited to Respondent, Palisades. Here was an Order possibly applying to them although they were not even parties to the action. Whether or not the Order technically applies to the other local New Jersey Squadrons is of no consequence, since the Director of the Division thinks it does. This creates the poten-

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tial for tremendous harassment. The first time the Division thinks it could prove a violation of the statute it will litigate either through the Division directly or by a nominal complainant—all at the taxpayers' expense. The fifteen New Jersey Squadrons, as private clubs supported solely by their members' dues, are not able to obtain such largess and would have to expend vast sums of money to defend these suits. Already thousands of dollars have been spent in the defense of this matter. This is why this Court should decide this very substantial issue now.

Palisades and USPS took an Appeal to the Appellate Division, Superior Court of New Jersey. The Appellate Division affirmed in an unreported opinion. Rehearing was requested. Petitioners filed a Motion to Intervene in which they immediately raised the issue of denial of due process of their constitutional and associational rights (See Appendix E for Motion to Intervene before the New Jersey Supreme Court. The Appellate Division motion was essentially the same). This motion was denied as was Appellants' Petition for Rehearing. Thereafter, the Supreme Court of New Jersey refused to hear Appellants or Interveners.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with the decisions of this Court and fundamental law which has been rooted in the tradition and conscience of our people from the time of the Magna Carta.

At the outset it should be noted that orders denying intervention are final. *Garber* v. *Kahn,* 88 N. J. Super. 343 (App. Div. 1965); *State* v. *McLean Lanzia,* 60 N. J. Super. 130, 136 (App. Div. 1959), aff'd 39 N. J. 595 (1963);

Brotherhood of Trainmen v. *B & O R R Co.*, 331 U. S. 519 (1947).

Additionally, the right to seek judicial review of administrative orders inures not only to those who are direct parties to the administrative proceeding, but, as Chief Justice Vanderbilt of the New Jersey Supreme Court stated,

> "• • • also belongs to all persons who are directly affected by and aggrieved as a result of the particular action sought to be brought before the Court for review." *Elizabeth Federal S & L Assn.* v. *Howell*, 24 N. J. 488 (1957) at page 499.

It is a fundamental principle of due process that the rights of a person may not be adjudicated in a proceeding to which he is not a party. *Hansberry* v. *Lee*, 311 U. S. 32 (1940). This principle is so inherent, so basic, that there are actually few reported decisions on this point. There is no question that constitutional due process mandates the right of an aggrieved party to his "day in Court". *Moore's Federal Practice*, Vol. 1B, Section 0.411 (1965).

Separate Petitioning Squadrons have their own policies and procedures for running their own non-profit corporations. Each is very independent in developing its own By-Laws and conducting its own affairs. To be sure, there are certain minimal criteria prescribed by the National organization, limiting membership to those male members desired by the individual fraternity. Each Petitioner's membership practices and procedures are unique—they are distinct and separate from any other Squadron's. The Division, however, has attempted to bind or affect these petitioners and every local Squadron even though no com-

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plaint was made against them nor were the practices of these Squadrons deliberated. See *Brunson* v. *Rutherford Lodge Number 547 of the Benevolent and Protective Order of Elks,* 128 N.J.Super 66 (Law Div. 1974), *Batavia Lodge Number 196* v. *N. Y. State Division of Human Rights,* 43 App. Div. 2nd 807 (4th Dept. 1973), modified 35 N.Y.2nd 143 (1974); *Moose Lodge Number 107* v. *Irvis,* 407 U.S. 163 (1972); *Cornelius* v. *Benevolent and Protective Order of Elks,* 382 F.Supp. 1182 (D. Conn. 1974), and *Junior Chamber of Commerce* v. *U.S. Jaycees,* 495 F2nd 883, *cert. den.* 419 U.S. 1026 (1974) where, for the purpose of a civil rights suit, each local was treated as a separate entity.

Petitioners herein are not in privity with Palisades or the USPS. The facts concerning their membership practices and other procedures are totally dissimilar in most respects to what the Hearing Examiner said were the conditions in and practices of Palisades. Yet, the Division has attempted to affect the petitioners who have acted independently and whose rights have not been adjudicated according to law. *Chase National Bank* v. *City of Norwalk, Ohio,* 291 U.S. 431, 437 (1933); *Alemite Mfg. Corp.* v. *Staff,* 42 F.2nd 832 (C.C.A. 2d 1930). See also *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U.S. 100 (1969) wherein it was opinioned among other things, that a non-party with notice cannot be bound by a decision until shown to be in active concert or participation.

It is axiomatic in Anglo-American jurisprudence that one cannot be bound by an *in personam* judgment where he has not been served or made a party. A Judgment rendered in such circumstances is not entitled to full faith and credit and an action to enforce it against an absent party is a violation of due process of law. *National Licorice Co.* v. *National Labor P. Board,* 309 U. S. 350 (1940).

Such a Judgment is void as to these parties and subject to collateral attack. *Fuentes* v. *Shevin*, 407 U. S. 67 (1972); *Armstrong* v. *Manzo*, 380 U. S. 545 (1964); *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306 (1950).

CONCLUSION

The correctness of the decision below, even assuming *arguendo* the questionable finding that Palisades offered membership to almost all men who passed the basic boating course, is open to serious question. That decision cannot be foisted on Squadrons which were not parties, have not been heard, and have very different membership practices. These Squadrons should not be required to wait until they are attacked, entailing very heavy costs which they can ill-afford and delays destructive of their private activities when the ultimate questions which would be raised thereby are already before the Court. For these reasons a Writ of Certiorari should issue to review the Judgment of the Superior Court of New Jersey, Appellate Division.

Respectfully submitted,

WILLIAM W. FARRAR
Counsel for Petitioners
242 Smull Avenue
North Caldwell, New Jersey 07006

Dated: March 3, 1976.

APPENDIX

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APPENDIX A

New Jersey Supreme Court Denial Motion to Intervene

SUPREME COURT OF NEW JERSEY

M-354 SEPTEMBER TERM 1975

MARILYN C. HINDEN, *et al.*,

Complainants-Respondents,

vs.

UNITED STATES POWER SQUADRONS;
PALISADES POWER SQUADRON,

Respondents-Appellants.

(LACKAWANNA, NORTHERN N. J. & WATCHUNG
POWER SQUADRONS),

Movant.

This matter having been duly presented to the Court, it is ORDERED that the motion to intervene is denied.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 10th day of December, 1975.

FLORENCE R. PESKOE
Clerk

FILED
Dec 10 1975

Florence R. Peskoe
Clerk

APPENDIX B

Appellate Division Denial Motion to Intervene

SUPREME COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-3104-73
Motion No. M-2143-74

Before Part C

MARILYN C. HINDEN; VERNON N. POTTER, Acting Director, DIVISION ON CIVIL RIGHTS,

Complainants-Respondents,

vs.

UNITED STATES POWER SQUADRONS; PALISADES POWER SQUADRON,

Respondents-Appellants.

JUDGES LEONARD, SEIDMAN, BISCHOFF

Moving papers filed July 1, 1975

Date submitted to Court July 9, 1975

Date decided July 11, 1975

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Appendix B

This matter having been duly presented to the Court, IT IS HEREBY ORDERED as follows:

Motion to Intervene Denied

For the Court:

LEON LEONARD
P.J.A.D.

Witness, the Honorable Leon Leonard, Presiding Judge of Part C, Superior Court of New Jersey, Appellate Division this 11th day of July, 1975.

ELIZABETH McLAUGHLIN
Clerk of the Appellate Division

Original Filed
Jul 14 1975

ELIZABETH McLAUGHLIN
Clerk

Appendix B

Appellate Division Opinion

SUPREME COURT OF NEW JERSEY

APPELLATE DIVISION—A-3104-73

MARILYN C. HINDEN; VERNON N. POTTER, Acting Director, DIVISION ON CIVIL RIGHTS,

Complainants-Respondents,

vs.

UNITED STATES POWER SQUADRON; PALISADES POWER SQUADRON,

Respondents-Appellants.

Argued June 2, 1975—Decided Jun 18 1975

Before Judges Leonard, Seidman and Bischoff.

On appeal from Findings, Determination and Order of the Division on Civil Rights.

Mr. Edward P. Lynch argued the cause for respondents-appellants (Messrs. Pitney, Hardin & Kipp, attorneys; Mr. Harry Mopsick, on the brief; Mr. Barry A. Guryan, on the reply brief).

Ms. Judith S. Musicant, Deputy Attorney General, argued the cause for complainants-respondents (Mr.

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Appendix B

William F. Hyland, Attorney General of New Jersey, attorney; Mr. Richard M. Conley, Deputy Attorney General, of counsel).

PER CURIAM

Marilyn C. Hinden filed a complaint with the Division on Civil Rights, charging that she had been denied membership in the appellant organizations solely on the basis of her sex, in violation of N.J.S.A. 10:5-1 *et seq.* Following a hearing, the hearing examiner submitted a report of her recommended findings of fact and conclusions of law, to which appellants filed objections. Thereafter the Director issued his Findings, Determination and Order. He adopted the findings and conclusions of the Hearing Officer and held that the denial of membership was an act of proscribed sex discrimination in violation of the public accommodation provision of N.J.S.A. 10:5-12(f).

The Director ordered appellants

(1) forthwith to change the qualifications in their constitution, by-laws, requirements, accommodations and privileges so as to eliminate sex discrimination; to disseminate instructions thereon and a notice of the order to their employees and members; and to send a copy of the written instructions and notice to the Division within 30 days;

(2) to extend membership invitations to women who have successfully completed the prerequisite courses, expressed a desire for membership, and successfully passed an interview; and

(3) to include in every advertisement and brochure, pamphlet or poster, a statement that such programs and activities are open to all individuals regardless of sex or

race; and conspicuously to post notices in all appellants' offices that they are a place of public accommodation.

By a supplemental order appellants were directed to pay to complainant, Marilyn C. Hinden, the sum of $500 as compensatory damages for the mental pain, suffering and humiliation suffered by her as a result of the discrimination.

Appellants moved to reopen the proceedings for a rehearing and revision of the Order, seeking, among other things, a deletion of the word "race" in the third paragraph thereof. The motion to reopen was denied. An amended Finding, Determination and Order was issued by the Director in which these provisions were added: appellants were directed forthwith (a) to cease and desist from doing any act prohibited by the law against discrimination; (b) to change immediately any and all policies, written and unwritten, in regard to the exclusion of women; (c) to submit to the Division for approval for a period of five years any and all new or modified criteria or rules; and (d) with respect to United States Power Squadron, to submit on a yearly basis a statistical summary of the number of its male and female members in New Jersey.

Appellants contend on this appeal that (1) the Division lacks subject matter jurisdiction because appellants are not places of public accommodation; (2) the Division's application of the law to appellants interferes with freedom of association; (3) appellants are private clubs exempt from the law against discrimination; (4) the Director exceeded his authority and abused his discretion; (5) the Director's refusal to reopen the proceedings to admit new evidence denied appellants the right

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to become a private club, and to exercise their constitutionally protected freedom of association; and (6) the record does not support a damage award for mental pain, suffering and humiliation.

We have thoroughly reviewed the record in this case and conclude that, with one exception, the action taken in the Division should not be disturbed. It is noted that the third paragraph of the Director's original Findings, Determination and Order required appellants to include in every advertisement, and in every brochure, pamphlet or poster, a statement that its programs and activities were open to all individuals regardless of sex and race. Appellants were not charged with any act of discrimination because of race, and it seems to us that the third paragraph contains an unfair and unjustified implication that they had violated the statute in that regard. Accordingly, the order will be modified by deleting from that paragraph any reference to race.

In all other respects, we affirm the Director's order, as supplemented and amended, essentially for the reasons expressed by him in his findings and determination. We are satisfied that the decision below was supported by sufficient credible evidence in the record as a whole. See also *Nat. Org. for Women* v. *Little League Baseball,* 127 N. J. Super. 522 (App. Div. 1974), aff'd by mem. —— N. J. —— (1974). We are also of the view that the Director's denial of appellants' motion to reopen the proceedings did not constitute a mistaken exercise of discretion on his part.

As modified, the order below is affirmed.

A True Copy

Elizabeth McLaughlin
Clerk

APPENDIX C

Order of the Supreme Court of the United States Extending Time to File Petition for Writ of Certiorari

SUPREME COURT OF THE UNITED STATES

No. A-752

LACKAWANNA POWER SQUADRON, *et al.*,

Petitioner,

v.

MARILYN C. HINDEN, *et al.*

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 8, 1976.

/S/ WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme
Court of the United States

Dated this 1 day of March, 1976.

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APPENDIX D

Complaint of Marilyn C. Hinden

(Filed—January 5, 1971)

I, Marilyn C. Hinden, residing at 12 Greenbriar Street, Bergenfield, New Jersey charge (1) United States Power Squadrons (2) Palisades Power Squadron, (3) George R. Hodell, (4) John Carnish, (5) Albert J. Magee, (6) Bruce Smith, (7) Dean C. Potter, (8) Harry Ball whose address is (1 & 3) P.O. Box 345, Montevale, N.J. (2, 4, 5, 6 & 7), Montevale, N.J., (8) 1714 Bay Blvd. Pt. Pleasant, New Jersey with an unlawful practice within the meaning of the Law against Discrimination, (P.L. 1945, Chapter 169, as amended; N.J.S.A. 10:5-1 et seq.) and specifically within the meaning of Section Four and Section 12, subsection f, of said Law; because of my Sex (x).

The facts on which the aforesaid charge is based are as follows:

• • •

2. I am a female proficient, interested in full membership to the United States Power Squadrons.

3. On or about November 7, 1970 the United States Power Squadrons District IV, Educational Conference was held for members only.

4. I inquired as to my possible participation and was advised by Harry Ball that women were not allowed.

5. I charge I have been unlawfully discriminated against because of my sex in that I have been denied membership in the United States Power Squadron because I am female.

6. I request whatever relief may be provided by law including but not limited to damages.

APPENDIX E

Motion to Intervene (Transcript Referred to in Motion Will be Found in Certified Record)

IN THE

SUPREME COURT OF NEW JERSEY

DOCKET NO. M-354

MARILYN C. HINDEN, VERNON N. POTTER, ACTING DIRECTOR, DIVISION ON CIVIL RIGHTS,

Complainants-Respondents,

vs.

UNITED STATES POWER SQUADRONS; PALISADES POWER SQUADRON,

Respondents-Appellants.

Lackawanna, Northern New Jersey and Watchung Power Squadrons respectfully request permission of this Court to intervene in the above matter in accordance with Rule 1:1-2 as applied with Rule 4:33 et seq., for an Order allowing them to intervene as of Right under R. 4:33-1, in that "• • • applicant(s) claim an interest relating to (this matter) which is the subject of the action and is so situated that the disposition of the action may as a prac-

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tical matter, impair or impede (their) ability to protect that interest * * *"; and a permissive intervention, under Rule 4:33-2 in that we have a defense "* * * and the main action (has) a question of law or fact in common". Intervenors will rely upon their answer setting forth the defense attached hereto and made a part hereof along with annexed Affidavit and transcript of testimony.

This motion is a request to intervene as a party in order to argue the points herein discussed on their merits.

Appendix E

Answer

IN THE

SUPREME COURT OF NEW JERSEY

DOCKET NO. M-354

MARILYN C. HINDEN, VERNON N. POTTER, ACTING DIRECTOR, DIVISION ON CIVIL RIGHTS,

Complainants-Respondents,

vs.

UNITED STATES POWER SQUADRONS; PALISADES POWER SQUADRON,

Respondents-Appellants.

Petitioners concede that the Intervener Rule 4:33 is found in the Rules Governing Civil Practice, in the Superior, County and Surrogate's Courts and appears at first blush not to apply to Appellate review.

However, in a given case, with proper circumstances, the Rule would apply in conjunction with Rule 1:12 to secure a just determination between the parties before the Court and those seeking intervention.

Prospective Interveners do not take issue with arguments advanced by Respondents-Appellants in their Peti-

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tion for Certification. Rather they argue independently that they have a right to a hearing—a right to be heard.

Lackawanna, Northern New Jersey and Watchung Power Squadrons are separate, autonomous individual legal entities, incorporated under the eleemosynary statute of the State of New Jersey.

These separate, distinct and independent corporations have not been complained against, noticed, served or made parties to the within action.

Consequently, to allow their constitutional and associational rights to be decided without a hearing on the merits is patently a denial of due process of law.

Yet the Division of Civil Rights has attempted to bind other local squadrons even though their membership and other practices were not considered.

With regard to selective membership practices, USPS doesn't initiate any members per se, only the Squadrons, i.e. the local clubs "invite" men well known to their membership to join the local Squadron.

In discussing Palisades Power Squadron's membership practices, the Hearing Examiner found "that in the Spring of 1970 every male who passed the exams was invited to membership and that in the Fall of 1970 only two men who passed were not invited to membership" (Da14-24 to 27).

These findings, even if such are or were true for the single cited year, the membership practices of Palisades are contrary to attached Affidavit of Mr. Wall of Northern New Jersey or of the testimony (attached) of Messrs. Finley of Lackawanna, Ulichny of Northern New Jersey and Henderson of Watchung (T58-15 to T101-14). Mr.

Appendix E

Henderson's testimony is particularly apropos on the issue of rejection and a person's desire for membership who was not invited—"We don't reject people, we select people." (T96-1 to 2).

This action by Palisades and possibly another Squadron or two should not seriously be considered as affecting the rest of the whole USPS fraternity, i.e. some four hundred thirty-three (433) local Squadrons in thirty-two (32) Districts throughout the USA. Regardless, the Civil Rights Division has attempted to bind or effect every local Squadron even though no Complaint was made against such nor were the practices of these Squadrons deliberated. The record is incomplete or void as to them.

Lackawanna, Northern New Jersey, and Watchung conduct an incidental public service similar to incidental public service conducted by other private clubs such as DAR, Eastern Star, Elks, Lions, Jaycees, Shrine, Rotary and Moose. See *Batavia Lodge #196* v. *N. Y. State Division of Human Rights,* 43 App. Div. 2nd 807 (Dept. 1973) *Modified* 35 N. Y. 2d 143; *Moose Lodge #107* v. *Irvis,* 407 U. S. 163 (1972); *Cornelius* v. *Benevolent and Protective Order of Elks,* 382 F2d 1182 (1974). They are no different.

The Director's Order, however, appears to require the Squadrons to discontinue this public function, an accessory to their other activities. The Order should be modified so that it does not apply to any Squadron other than Palisades.

The issue is not whether women are members or not—it is rather whether the individual Squadrons are private clubs or public accommodations. If there had been no litigation what would have been the effect on female membership?

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Appendix E

This is why these Squadrons desire to be heard.

Respectfully submitted,

WILLIAM W. FARRAR
Attorney for Lackawanna, Northern New Jersey & Watchung Power Squadrons

CERTIFICATE OF SERVICE

I hereby certify that two true copies of the Notice of Motion for leave to intervene attached hereto were served on William F. Hyland, Attorney General of New Jersey, attorney for Complainant-Respondent, Division of Civil Rights, on July 28, 1975, by delivering same to his office at State House Annex, Trenton, New Jersey, and two true copies were served on Edward P. Lynch, attorney for Respondents-Appellants, Palisades Power Squadron, by delivering same to his office at 310 South Street, Morristown, New Jersey, on July 28, 1975, and two true copies were sent to Robert Williams, Esq., 12 Soux Road, Trenton, New Jersey, on July 29, 1975.

WILLIAM W. FARRAR, ESQ.
Attorney for Lackawana, Northern New Jersey and Watchung Power Squadrons

Appendix E

Affidavit of C. Kenneth Wall

IN THE

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION—DOCKET NO. A-3104-73

MARILYN C. HINDEN; VERNON N. POTTER, ACTING DIRECTOR, DIVISION ON CIVIL RIGHTS,

Complainants-Respondents,

vs.

UNITED STATES POWER SQUADRONS; PALISADES POWER SQUADRON,

Respondents-Appellants.

STATE OF NEW JERSEY, }
COUNTY OF } ss.:

I, C. Kenneth Wall, of full age, upon my oath, depose and say:

1. I am presently and have been a member of Northern New Jersey Power Squadron (hereafter NNJPS) since 1962.

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Appendix E

2. I have served over the years on various committees and in various capacities culminating in being elected Commander of the Squadron for the year April 1972 to April 1973. I am presently Chairman of the Membership Committee.

3. NNJPS is a private club, incorporated as a non-profit corporation in the State of New Jersey with the membership generally coming from the West Essex Area.

4. Membership is by invitation only. Invitation is gained by the recommendation of a member. Prospective members are friends, neighbors or fellow boatmen of members. The knowledge of prospective members is completely disassociated from the Basic Boating Course.

5. After receipt of the recommendation by the Membership Chairman, of a prospective member and sponsorship by two additional members, there is a subsequent interview by a member of the Membership Committee which provides a basis for recommendation to accept or reject.

6. Letters are sent to a prospective member advising him of action of the Membership Committee and requesting an expression of his intention of acceptance.

7. If subsequently approved by the general membership and finally approved by the Executive Committee a formal invitation is issued to the prospective member, he is sworn in and eventually receives a membership card.

8. Prospective members have been encouraged to take the Boating Course. Approximately 40% of those who

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are males, at least 18 years old and U.S. citizens who are taking the Basic Boating Course are prospective members. Out of 118 eligible Basic Boating students in the Spring and Fall Courses of 1973, 33 eventually became members in February, 1974. Out of 127 eligible Basic Boating students in the Spring and Fall Courses of 1974, 39 eventually became members in February, 1975. No members have been taken from the 1975 Basic Boating Course.

9. As long as I have been a member of NNJPS, membership to this club has been based on a subjective evaluation of a man's background, character and personality—Selectivity has been the key.

10. Many members do not own and never have owned boats. They join because of their common interest with our private boating fraternity. Many are sailboaters, many are interested in outboards, others are interested in inboards; most join for social compatability—an associational preference.

11. Like any other hobby or avocation activity, and like any other democratically run club, NNJPS is controlled ultimately by its members who through nomination and election, elect a 'Bridge' and 'Executive Committee' to administer the club.

12. The work of NNJPS is done completely by volunteers through, usually, committees.

13. Our endeavors are strictly on a non-profit basis solely for the benefit and pleasure of our members and their guests, other than one small aspect of our work—the public boating course.

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14. While we teach advanced courses only to our members, we recognize that all it takes to run a boat is the price of a key—our public charity is our recognition that if we don't provide the opportunity for a basic course we endanger the lives of the inexperienced along with the experienced on the water. Coast Guard statistics show over 8,000,000 boats on water with 44,000,000 boaters in the U.S. and very few who are trained.

15. The Basic Boating Course is publicized to the public. No mention is or has been made in the boating publicity by NNJPS with regard to membership.

16. The vast majority of publicity about our club is internal—to the membership only, through a quarterly paper, "Northern Lights", and various flyers concerning mostly our considerable social functions, with two flyers being sent out, one in August and the other in December concerning our "Advanced and Elective" courses.

17. NNJPS property, such as bank accounts, the Squadron Pennants, flags, trophies, and other typical yacht club personal property is owned by the members. We neither receive nor solicit any municipal, county, state or federal funds either directly or indirectly. Our financial basis for support is membership dues and receipt from sale of educational materials.

18. Our religious activities are non-sectarian funeral and memorial services, invocations and benedictions at meetings or meals.

19. We normally pay for use of the facilities for our advanced and elective courses. We are presently using

Kimberly School, Montclair. We have sometimes been able to use private, non-governmental facilities without payment such as St. Aloysius, Caldwell.

20. Our formal social functions this year began with the Change of Watch Dinner-Dance in the Spring, a very nice, fairly expensive affair held at the Wayne Manor. All members were invited to bring their wives and guests. All members wore USPS uniforms, blazers, or appropriate gentlemenly attire. A Spring Rendezvous was held in June at the Patton Avenue Yacht Club. This was a family affair. On July 19 to August 2, the Squadron Cruises are scheduled—powerboats to Lake Champlain and sailboats ot Long Island Sound. August 9 we have our annual picnic—a Shipwreck Party at Barnegat Bay. On September 20 a predicted log contest—a timing competition for motorboats which does not involve speed in the sense of racing; On October 23 we have one of our two meetings a year where non-members are excluded—our regular Squadron meeting. On December 12 our Christmas Party is scheduled at the Friar Tuck; on February 1 our Founder's Day Dinner-Dance is likewise scheduled at the Friar Tuck. The Nautical Auction follows on March 13 after which our Squadron Annual Meeting is scheduled for March 25. This meeting is only for members. Many of these functions are for wives and children.

21. Our work is done completely through volunteers. Consequently the associational bonds between members are closer than the case of a yacht club that hires a professional sailing instructor. The purpose of our club is to associate together in a fraternal way. Gentlemen who enjoy exhibiting and socially participating with other Gentlemen with a respect for nautical tradition and eti-

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quette and a high standard of skill in the handling and navigation of yachts above that exhibited by the average sailor or the usual yacht or boat club.

C. KENNETH WALL

Sworn and subscribed to before me
this 1st day of July, 1975.

WILLIAM W. FARRAR
Attorney at Law
State of New Jersey

Appendix E

Affidavit of Walter J. Sutcliffe

IN THE

SUPREME COURT OF NEW JERSEY

DOCKET NO.

MARILYN C. HINDEN; VERNON N. POTTER, ACTING DIRECTOR, DIVISION ON CIVIL RIGHTS,

Complainants-Respondents,

VS.

UNITED STATES POWER SQUADRONS; PALISADES POWER SQUADRON,

Respondents-Appellants.

STATE OF NEW JERSEY, }
COUNTY OF MORRIS, } SS.:

I, Walter J. Sutcliffe, of full age, upon my oath, depose and say:

1. I joined Northern New Jersey Power Squadron (hereafter NNJPS) in 1940, and have been active in Power Squadron affairs since that time.

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2. I have served on many committees on the Squadron, District and National levels, became Commander of NNJPS and later Chief Commander of the USPS on the national level.

3. Among other organizations I belong to is the New York Yacht Club.

4. NNJPS, like other USPS Squadrons ("squadron" meaning club) comparably has the same social and boating activities of yacht clubs of similar size.

5. During my term of office as Chief Commander, we had our 50th anniversary and celebrated USPS day by parading over 120 boats up the East River to the Worlds Fair grounds.

6. NNJPS financial structure, like other Squadrons, is likewise similar, in that we have initiation fees, annual dues, etc., as required also by Yacht Clubs.

WALTER J. SUTCLIFFE

Sworn and subscribed to before me
this 28th day of July, 1975.

WILLIAM W. FARRAR
Attorney at Law, State of N.J.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. A-752

LACKAWANNA, NORTHERN NEW JERSEY AND WATCHUNG POWER SQUADRONS,

Petitioners,

vs.

MARILYN C. HINDEN, VERNON N. POTTER, Acting Director, DIVISION ON CIVIL RIGHTS, UNITED STATES POWER SQUADRONS, PALISADES POWER SQUADRONS,

Respondents.

On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION

Counter-Statement of Question Involved

Should a writ of certiorari be granted to review a denial of a petition to intervene which was first submitted after both the administrative hearing and appellate review of a case in which petitioners' interests were adequately represented at all levels by virtue of their being local affiliates of the national organization named in the suit.

Counter-Statement of the Case

On June 1, 1973, the New Jersey Division on Civil Rights ("Division") issued an Order holding United States Power Squadrons ("USPS") and the Palisades Power Squadrons, the named USPS local, public accommodations under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. The order essentially required that USPS and Palisades cease denying women all the advantages, privileges and facilities of membership that men have enjoyed heretofore, and that women be subject to the same minimal membership criteria as have always been considered by USPS sufficient to guarantee the effective functioning and character of the organization. Palisades was the named local because it was that branch of USPS into which the complainant was denied membership. However, the Division's findings that Palisades and USPS were public accommodations were largely based upon an evaluation of the purposes, practices and procedures contained in USPS's national policies which apply to and are carried out by all local squadrons under USPS auspices. More specifically, the Hearing Examiner found that the raison de'etre of USPS is its educational function (Aa10),* as in the words of its Chief Commander:

> ". . . over all the years our mission has been to teach safety in Boating, Seamanship, etc.—not to

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* This notation refers to the appendix filed by USPS with the Superior Court of New Jersey, Appellate Division, which was certified to the Court on February 10, 1976 in connection with the related case of *U.S. Power Squdrons, Palisades Power Squadron* v. *Marilyn C. Hinden, Division on Civil Rights,* No. 75-1553.

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> be a fellowship and club organization." (1T 178-23 to 1T 179-7).*

This is emphasized in the constitution of the national organization, in which it is noted that the objects of USPS:

> "shall be to establish a high standard of skill in the handling and navigation of yachts; to encourage the study of the science of navigation and small boat handling; to cooperate with the agencies of the United States Government charged with the enforcement of the laws and regulations relating to navigation and to stimulate interest in activities which tend to the up-building of our Army, Navy, Coast Guard and Merchant Marine." (Aa48)

The national constitution lists the membership requirements of USPS as:

> "Any male person, 18 years of age or over, having sufficient nautical knowledge, who is a citizen of the United States of America and who passes the prescribed examination" (Aa49).

These aspects of the organization, along with other of its practices, activities and purposes, which are more fully set forth in the State's Motion to Dismiss and Brief in Support Thereof** filed in this Court mandated a finding by the New Jersey Division on Civil Rights that USPS is a public accommodation within the meaning of N.J.S.A. 10:5-5(l).

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* The transcripts of the hearing below have been certified to this Court as part of the record in related case No. 75-1553.

** That motion and brief are filed in connection with related case No. 75-1553.

The first time that petitioners herein attempted to intervene below was five years after the administrative complaint was filed against USPS and Palisades in 1970, four years after the hearing was concluded in May of 1971, a year after the Notice of Appeal was filed in the state appellate court, and a month subsequent to the holding of that court affirming the Division. The Appellate Division of the New Jersey Superior Court denied petitioners' motion to intervene on July 11, 1975, and the Supreme Court of New Jersey denied an identical motion on December 10, 1975.

ARGUMENT

The petition for writ of certiorari should be denied because the motion for intervention below was properly denied as being grossly out of time as well as wholly unnecessary inasmuch as petitioners' interests were adequately represented by the named parties.

The rules under which petitioners attempted to intervene below are New Jersey Court Rule 4:33-1 and Rule 4:33-2 which are civil practice and not appellate rules. In addition to their motion being made under inapplicable rules, it was unclear from petitioners' papers whether they were seeking an opportunity for a trial of the facts, which, of course, was long since concluded, or an opportunity to intervene in a then non-existent appeal. Thus it is apparent that there was nothing below in which petitioners could have properly intervened.

Even assuming the Court rules were applicable and the issue was not moot, intervention was properly denied

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in this case. Both Rule 4:33-1 and Rule 4:33-2* include the requirement that the application for intervention be timely. Both New Jersey and federal courts have held that untimeliness is a sufficient ground to deny intervention. See *State* v. *Lanza,* 39 N.J. 595, 190 A2d 374 (1963) app. dis. cert. den. 375 U.S. 451 (1964). In *Clark* v. *Brown,* 101 N.J. Super. 404, 244 A2d 514 (Law Div. 1968) where a motion to intervene subsequent to final judgment was denied, the court noted "Dismissal of a motion for intervention under R.R. 4:37-1 [presently Rule 4:33-1] is within the discretion of the trial court and untimeliness is sufficient ground for denying the same . . . Also, intervention after judgment is not often granted." *Id.* at 411. Further, as the court noted in *Township of Hanover* v. *Town of Morristown,* 118 N.J. Super. 136, 143, 286 A2d 728, 732 (Ch. Div. 1972) aff'd 121 N.J. Super. 536, 298 A2d 89 (App. Div. 1972), "An essential prerequisite to intervention is timeliness, which should be equated with diligence and prompt-

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*R. 4:33-1: Upon timely application anyone shall be permitted to intervene in an action if the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

R. 4:33-2: Upon timely application anyone may be permitted to intervene in an action if his claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a state or federal governmental agency or officer, or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the agency or officer upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

ness. One who is interested in pending litigation should not be permitted to stand on the sidelines, watch the proceedings and express his disagreement only when the results of the battle are in and he is dissatisfied." See also *Jacobs* v. *Volney Felt Mills,* 47 F.Supp. 493 (N.D. Ind. 1942); *Baltimore Trust Co.* v. *Interocean Oil Co.,* 30 F. Supp. 484 (D. Md. 1940).

In the instant case there cannot be even the most meager claim of timeliness on petitioners' part. The petition to intervene came after five years after the complaint was filed in 1970, over four years after the hearing was concluded on May 11, 1971, a year after the Notice of Appeal was filed and a month subsequent to the Appellate Division's decision upholding the Division's order. Furthermore, there has been no claim that petitioners were not aware of the ongoing proceedings throughout the last five years as well there could not be. In addition to newspaper coverage which the case had received, *Township of Hanover* v. *Morristown,* 118 N.J. Super. at 142, 286 A2d at 732 (Ra46-49)* petitioners are themselves local affiliates of the organization which was a party to the action. There appeared to be no good reason for petitioners' dilatoriness in presenting this motion at the conclusion of the hearing and appeal and for that reason alone it was properly denied.

In addition to the untimeliness of the request for intervention, it is clear that petitioners failed to meet a further requirement of Rule 4:33-1 for intervention in that they failed to show they were not adequately represented by existing parties. They claim to be separate and distinct entities from USPS, however they offer virtually

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* This notation refers to the appendix filed by the Division on Civil Rights with the Superior Court of New Jersey, Appellate Division, which was certified to this Court on February 10, 1976 in connection with related case No. 75-1553.

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no evidence that this is so. Although they assert that their membership practices are selective and therefore different from the general policy of USPS, a close reading of the affidavit submitted below in support of that contention does not contradict the Division's findings that a large majority of men taking the basic boating course are asked to become members (Pa16-21). In any event, more selective membership practices are the only characteristics which petitioners claim differentiate themselves from USPS. In fact, since they are actually affiliated with and part of United States Power Squadrons, their interests could not have escaped representation below. Since the affiliates are governed by the national's constitution, and the national was held to be a public accommodation under the Law Against Discrimination by virtue of the agglomeration of its purposes and practices, the order is entirely proper as regards its affect on all New Jersey affiliates and petitioners cannot now be heard to complain.

Petitioners have presented no authority for the theory that a holding as to the character of a national organization with many local affiliates is only binding upon the locals actually named in the suit. In fact, it is apparent in a number of the cases cited in support of their position that the court recognized the affect of its holding on all the locals within the jurisdiction. *Junior Chamber of Commerce* v. *U.S. Jaycees,* 495 F2d 883 (10th Cir. 1974), cert. den. 419 U.S. 1026 (1974); *Cornelius* v. *Benevolent Protective Order of the Elks,* 382 F.Supp. 1183 (D. Conn. 1974); *Brunson* v. *Rutherford Lodge No. 547,* 128 N.J. Super. 66, 72, 319 A2d 80, 83 (Law Div. 1974).

Finally, Rule 4:33-2 provides when considering motions for permissive intervention: "In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of

the original parties." The complainant in this case had waited over four years for an adjudication of this matter. All issues raised by petitioners herein, including that of associational freedom had been raised, briefed and argued extensively on all levels of the proceeding. To grant intervention to parties who had been unduly lax about asserting their interest, which in any case had been fully represented throughout, would only have further delayed the process in which all issues raised had already been decided.

In sum, then, because there was no proceeding in existence at the time of their motion below in which petitioners could have intervened, and, in addition, because of the gross untimeliness of their motion, the fact that their interests were adquately represented throughout the proceeding and intervention would only have caused further delay without good reason, the motion to intervene below was properly denied.

CONCLUSION

It is respectfully submitted that for the foregoing reasons, the petition for a writ of certiorari should be denied.

WILLIAM F. HYLAND
Attorney General of the State of New Jersey
Attorney for Respondents, Hinden and Potter